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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the district.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 932 F.2d 1433. The opinion of the district court (Pet. App. A10-A29) is reported at 731 F. Supp. 1563.

JURISDICTION

The judgment of the court of appeals was filed on June 10, 1991. A petition for rehearing was denied on August 7, 1991. Pet. App. A34-A35. The petition for certiorari was filed on October 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1988, the United States filed an *in rem* action in the United States District Court for the Southern District of Florida seeking forfeiture of a single-family residence at 6960 Miraflores Avenue in Coral Gables, Florida. The complaint alleged that Indalecio Iglesias was the true owner of the property and that Iglesias had used the proceeds of narcotics trafficking to buy the residence. Pet. App. A11. A warrant to arrest the property was issued, and the United States Marshal seized the property. Pet. App. A31.

In response to the complaint, Thule Holding Corporation, a Panamanian shell corporation, filed a claim stating that it was the owner of the Miraflores Avenue residence. Pet. App. A11. In addition, petitioner filed a claim asserting an $800,000 lien interest in the property pursuant to a mortgage and security interest recorded on September 30, 1987. *Ibid.* Thereafter, Thule Corporation filed a stipulation consenting to forfeiture of its interest. Pet. App. A11, A32. At the government's request, petitioner agreed to an interlocutory sale of the property. The residence was sold for $1,050,000 and the proceeds were retained by the Marshal pending disposition of the case. Pet. App. A11 n.2.

2. The government's forfeiture complaint proceeded to a bench trial. The evidence at trial showed that on December 10, 1981, Iglesias was arrested by the Customs Service on board a Colombian vessel containing 300 pounds of marijuana and that in April 1981, Bahamian officials arrested Iglesias for possession of 3,000 pounds of marijuana and fined him $10,000. Pet. App. A12. In addition, a DEA agent presented information gained from confidential in-

formants that between 1980 and 1985, Iglesias imported 30,000 kilograms of cocaine into the United States from Colombia. An informant estimated that Iglesias made $180 million in profits from these importations. Pet. App. A13.

In 1983, Iglesias, acting through Thule, purchased the lot and the then-partially constructed residence at 6960 Miraflores Avenue. To complete construction of the residence, Iglesias paid a contractor a total of between $200,000 and $220,000 in weekly cash installments of $7,000 to $9,000. A second contractor received approximately $140,000, mostly in cash. Pet. App. A13. After completion of the residence, Iglesias and his family lived there. *Ibid.*

In August 1987, Iglesias learned that the IRS was investigating him and the Miraflores Avenue property. Pet. App. A14. Iglesias immediately put the house up for sale and approached Miami lenders to secure a mortgage on the property. Petitioner agreed to provide an $800,000 one-year "balloon" note on the property, which was appraised at $1.2 million, without asking the purpose of the loan. Petitioner's president was personally involved in the transaction, which was quickly approved outside of petitioner's normal channels. Petitioner did not conduct a title search of the property or investigate Thule, the corporate borrower. When the loan was approved, the residence was vacant. The second guarantor of the loan used its proceeds to buy expensive gifts for petitioner's president's family and to purchase an airplane ticket to Switzerland for Iglesias. Petitioner transferred the proceeds of the loan to Iglesias' Swiss bank account.

Iglesias fled the United States shortly after this transaction. Pet. App. A14, A23.[1]

The district court ordered petitioner's interest in the property forfeited. Pet. App. A10-A29. The court found that probable cause existed to believe that "Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through [petitioner's] mortgage into his Swiss bank account." Pet. App. A16. The court held that petitioner was entitled to assert an innocent owner defense to the forfeiture, but that petitioner was not an innocent owner. The court found that the borrower was a Panamanian shell corporation unknown to petitioner whose principal asset was a vacant residence; that the borrower had no business and could not demonstrate how the loan was to be repaid; that petitioner structured the loan in an unusual fashion and did not establish a repayment schedule for the loan; that the bank did not inquire why a loan was necessary if the property was about to be sold; that once the loan was approved, petitioner's president received a $3,000 vacation from the second guarantor of the loan; and that petitioner transferred the proceeds of the loan to a Swiss account. Pet. App. A23-A26.

3. On March 15, 1990, the district court issued a final judgment of forfeiture. Pet. App. A30-A33. Although petitioner filed a timely notice of appeal, it did not file a motion to stay execution of the judgment or post a supersedeas bond. Pet. App. A3. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds from the

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[1] During the pendency of the forfeiture action, Iglesias was indicted in the Southern District of Florida on narcotics violations. Pet. App. A2-A3.

sale of the house to the Asset Forfeiture Account of the United States Treasury. *Ibid.*

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A1-A9. Relying on *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988), the court held that removal of the proceeds of the sale from the district destroyed the court's *in rem* jurisdiction. Pet. App. A5. The court observed that "[w]here an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction." *Ibid.* (quoting *One Lear Jet*, 836 F.2d at 1573). The court also rejected petitioner's argument that *in personam* jurisdiction existed because the government had served petitioner with the complaint of forfeiture. The court held that the action was against the property, and that the government had served petitioner as a courtesy, not because it was required to do so. Pet. App. A6-A7 (citing Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C). Finally, the court held that the government was not estopped from contesting the jurisdiction of the court based on its agreement that the United States Marshal would retain the proceeds of the sale during the pendency of the forfeiture action. Pet. App. A8-A9.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in dismissing its appeal. In addition, petitioner argues that the decision of the court of appeals conflicts with the decisions of other courts of appeals and that this Court should grant certiorari to resolve the conflict. The decision below is correct. Although the courts of appeals are divided over the question whether the removal of the *res* from the district deprives the court of jurisdiction in an *in rem* action, the practical significance of that conflict is not apparent, given the claimant's ability to seek a stay of the district court's judgment in an appropriate case. In addition, Congress is currently considering the question and may enact legislation that resolves the conflict in the near future. Accordingly, review by this Court would be premature.

1. This Court has recognized that jurisdiction in civil forfeiture proceedings, as in all *in rem* actions, is based on the court's control of the *res*. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-684 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269, 271-272 (1917). It follows that, once a judgment of civil forfeiture has been entered, a claimant must seek a stay of execution, file a supersedeas bond, or take other action to preserve the *res* pending appeal. If the claimant fails to do so, removal of the *res* from the district will deprive the appellate court of jurisdiction to consider an appeal.

Contrary to petitioner's contention, this rule does not work an injustice on claimants or permit the

government to defeat appellate jurisdiction whenever it chooses by removing the *res* from the court's territorial jurisdiction. Like a judgment in any other civil action, a forfeiture judgment is automatically stayed for ten days following its entry. See Fed. R. Civ. P. 62(a). During that time, a losing claimant may file a supersedeas bond that automatically stays the judgment during the pendency of the appeal. See Fed. R. Civ. P. 62(d). Alternatively, since a district court has discretion to dispense with the supersedeas bond requirement, a claimant may file a motion to stay execution of the judgment without requiring a bond. See *Northern Indiana Public Service Co.* v. *Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986); *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 636 F.2d 755, 757-760 (D.C. Cir. 1980). If the district court refuses to stay its judgment pending appeal, the claimant may seek a stay from the court of appeals. See Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g). Consequently, the government has no power unilaterally to deprive the court of its jurisdiction. In this case, petitioner neglected even to seek a stay pending appeal. Petitioner's argument is, in reality, a complaint about its own failure to take appropriate steps to preserve its rights on appeal.

Nor is there any merit to petitioner's contention that the government submits itself to the *in personam* jurisdiction of the court whenever it initiates a civil forfeiture proceeding. This was a pure *in rem* proceeding, not a proceeding brought both *in rem* and *in personam*. If petitioner's view were correct, a court would have *in personam* jurisdiction over any

participant in an *in rem* proceeding. That would be inconsistent with the basic concept of an *in rem* action, which bases jurisdiction on the court's control of the *res* because the judgment will be satisfied from the *res*. Subjecting participants in an *in rem* proceeding to *in personam* jurisdiction would mean that jurisdiction would not depend on control of the *res* and that a judgment could be entered against the participants themselves.

2. In *One Lear Jet*, the Eleventh Circuit, sitting en banc, reaffirmed the traditional rule that the court's jurisdiction in an *in rem* action depends on control of the *res*. 836 F.2d at 1573. The court in *One Lear Jet* rejected the claimant's argument that the government, by invoking the power of the court, submitted itself to the *in personam* jurisdiction of the court and thus that the court retained the authority to order the government to produce the *res* or the proceeds from its sale. *Id.* at 1575-1577. The court reiterated that, in an *in rem* action, the *res* is the defendant and the sole basis for jurisdiction. *Ibid.*[2]

At the time of its decision, *One Lear Jet* represented the unanimous view of the courts of appeals. See *United States* v. *$2,490*, 825 F.2d 1419, 1420-1421 (9th Cir. 1987); *United States* v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 717 (7th Cir. 1985). Since the decision in *One Lear Jet*, the Ninth and Seventh Circuits have adhered to the traditional rule. See *United States* v. *$29,959*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *Ten*

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[2] The Eleventh Circuit recently reaffirmed *One Lear Jet*. See *United States* v. *Four Parcels of Real Property in Greene & Tuscaloosa Counties*, 941 F.2d 1428, 1436 n.18 (1991) (en banc).

Thousand Dollars, 860 F.2d 1511, 1513 (9th Cir. 1988); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989). But several courts of appeals have declined to follow *One Lear Jet* and have rejected the traditional jurisdictional rule.

In *United States* v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991), the court held that, by bringing a forfeiture complaint, the government submitted itself to the *in personam* jurisdiction of the court. 912 F.2d at 7. In addition, the court rejected the government's argument that the Appropriations Clause of the Constitution prohibits a court from ordering the government to return forfeited funds deposited into the Treasury. *Ibid.* In *United States* v. *$95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990), the court held that "by initiating the forfeiture proceeding in the district court, the government has subjected itself to th[e] court's *in personam* jurisdiction." And in *United States* v. *One Lot of $25,721.00 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991), the court held that "the time has come to jettison the 'no *res*, no jurisdiction' rule." The court described the rule as "an admiralty fiction" that "is particularly inapposite to a currency forfeiture case." *Id.* at 1420.[3] In short, there is a conflict between the First, Second, and Fourth Circuits on the one hand and the Seventh, Ninth, and Eleventh Circuits on the other.

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[3] In *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991), the court declined to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money. The court reasoned that when cash is forfeited to the United States, the *res* is simply a potential obligation of the United States that is present everywhere in the United States.

3. Congress currently is considering legislation that would resolve this conflict. On November 21, 1991, the Senate passed S. 543, 102d Cong., 1st Sess., which provides, in part:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the appealing party to post an appeal bond.

See 137 Cong. Rec. S17,482 (daily ed. Nov. 21, 1991); see also *id.* at S16,643 (daily ed Nov. 13, 1991) (explaining S. 543). The proposed legislation would overturn the traditional rule requiring possession of the *res* to maintain jurisdiction in the district court and the court of appeals. Under the proposed statute, the transfer of the *res* out of the territorial jurisdiction of the court would not deprive the court of jurisdiction.

Although the House of Representatives failed to pass this legislation before Congress adjourned in 1991, it is currently pending in identical form as part of S. 1665, 102d Cong., 1st Sess., and may be enacted in 1992. At the present time, therefore, consideration of the question by this Court would be premature.

A legislative resolution of this issue is particularly appropriate because a judgment for the petitioner in this case would require a payment of funds from the Treasury without appropriation by Congress. That

result would violate the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7. See *United States* v. *$57,480.05*, 722 F.2d 1457, 1459 (9th Cir. 1984) (citing authorities).

Finally, further review is not warranted because petitioner neglected to seek a stay pending appeal from the district court or the court of appeals. As noted above (p. 7, *supra*), district courts and courts of appeals have discretion to enter a stay pending appeal even if the claimant does not post a supersedeas bond. Because it is not apparent that courts will often deny such stays, the conflict among the courts of appeals may be of limited practical significance. In any event, petitioner's failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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